No. 92-416

Supreme Court, U.S.
FILED
OCT 19 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

JOANNE M. WESTON, Petitioner,

vs.

FIRST INTERSTATE BANK OF CALIFORNIA;
FIRST INTERSTATE MORTGAGE COMPANY;
AND
FRANKLIN S. CIBULA, A LAW CORPORATION,
Respondents.

ON
PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

JoAnne M. WESTON
414 Chestnut Street
Mount Shasta, CA 96067
(916) 926-4021 or 4410

Petitioner in pro per

BEST AVAILABLE COPY

TABLE OF CONTENTS

Item:	Page No.
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES.....	ii
PETITIONER'S REPLY BRIEF.....	1
RESPONDENT'S ARGUMENTS.....	2
A. Bankruptcy Court Jurisdiction....	2
B. That Petition Is Moot.....	11
C. Improper Judicial Conduct.....	15
CONCLUSION.....	20

TABLE OF CITED AUTHORITIES

Statutes: Page

11 U.S.C. § 506(b).....

11 U.S.C., FRBP 7062(b).....

11 U.S.C., FRBP 8005.....3

11 U.S.C., FRBP 8011(e).....

11 U.S.C., FRBP 9023.....

Cases:

In re Bialac, 15 B.R. 901, 903 (1981), aff'd, 694 F.2d 625 (9th Cir.1982)..

Gribble v. Harris, 625 F.2d 1173, 1174 (5th Cir.1980)..

Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982).....

Matter of Chicago, Milwaukee, St.Paul & Pac. 961 F.2d 1260 (7th Cir.1992).....

Midwest Properties No. Two v. Big Hills Inv 93 B.R. 357 (N.D. Tex. 1988).....

Mullis v. U.S. Bankruptcy Court, District Nevada, 828 F.2d 1385 (9th Cir.1987).....

(continued)

TABLE OF CITED AUTHORITIES

(continued)

Cases: Page No.

Norwest Bank v. Ahlers,
485 U.S. 197 (1988)..... 18

In re Texas Extrusion Corp.,
836 F.2d 217 (5th Cir.1988)..... 8

United Savings Ass'n. v. Timbers of Inwood Forest, 484 U.S. 365 (1988)..... 15

Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U.S. 131 (1937)..... 3

No. 92-416

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOANNE M. WESTON,

Petitioner,

vs.

FIRST INTERSTATE BANK OF CALIFORNIA;
FIRST INTERSTATE MORTGAGE COMPANY;
AND
FRANKLIN S. CIBULA, A LAW CORPORATION,

Respondents.

Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S REPLY BRIEF

Respondent, FIRST INTERSTATE BANK OF CALIFORNIA, asserts that the Petition for a Writ of Certiorari No.92-416 should not be granted, and claims that the standards set forth by this Court's Rule 10.1(a) for the petition to be granted have not been met. Petitioner contends that the standards <u>have</u> been met, and that Respondent fails to rebut

The contentions advanced by the petition as to the issues presented, in Respondent's Brief in Opposition.

RESPONDENT'S ARGUMENTS

Respondent's opposing brief basically presents three arguments to support its claim for denial of the petition. It first states the Ninth Circuit Court decision "is correct because the Bankruptcy Court had jurisdiction to enter Findings of Fact and Conclusions of Law to support its conversion order"; then it asserts that the petition is "moot". (Br. in Opp. p. 1) The third contention claims that no improper judicial procedure occurred in the proceedings below. These arguments will be addressed in the same order as presented.

A. Bankruptcy Court's Jurisdiction

Respondent provides its own version of the petition's "Questions Presented" section, attempting to limit the jurisdictional issues to only one; whether or not the Bankruptcy Court had jurisdiction to order preparation

of findings of fact and conclusions of law to support its conversion order, after the order had been appealed. Respondent thus hopes to focus attention away from the true jurisdictional issue presented by the petition; i.e., can a bankruptcy court continue to issue new orders which impact upon the status-quo of parties involved in a pending appeal? The Petitioner contended that Rule 8005, Federal Rules of Bankruptcy Procedure ("FRBP") is the controlling statute, and pursuant to it, the lower court cannot issue orders which alter the status-quo of the parties involved. The Respondent contends that a bankruptcy court is free to alter or even vacate its appealed orders, and cites Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U.S. 131 (1937), in support. (Br. in Opp. p. 2-3) Respondent ignores the clear directives re jurisdiction following appeal set forth by this Court in Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982), which have been cited

by courts of virtually every circuit for the concept that the trial court is immediately divested of jurisdiction over its orders by the filing of an appeal. This case was also cited in the petition at page 43. The latest such citation can be found in Matter of Chicago, Milwaukee, St. Paul & Pac. R., 961 F.2d 1260 (7th Cir. 1992), at 1263.

Respondent first states that the trial court retained jurisdiction because the "proceedings had not been terminated" at the time the preparation order was issued, and follows thereafter with the statement that even if it were true that the Bankruptcy Court lost its jurisdiction due to the appeal, it was only in relation to the appealed order. (Br. in Opp. p. 3) Respondent thus contends first the lower court did not lose jurisdiction, then asserts that the loss was only in relation to the orders being appealed. As the order for findings and conclusions was to support the conversion order, which was already appealed,

Respondent's arguments patently fail.

Respondent's argument that the "proceedings" had not terminated because the Chapter 7 case was still viable when the Bankruptcy Court ordered the findings and conclusions to be prepared, also fails. The "proceedings" were those involved in the conversion matter; clearly, those proceedings were terminated by the properly filed notice of appeal.

Respondent accuses Petitioner of trying to create a false concept of conflict within the Ninth Circuit re the jurisdictional issue by "citing various Ninth Circuit Court decisions which have no relevance to the issues presented to the Court. Further, Petitioner misleadingly cites case law for propositions which simply do not exist." (Br. in Opp. p. 4) In a pathetic attempt to bolster this utterly false accusation, Respondent then quotes from one of Petitioner's cited cases; Mullis v. U.S. Bankruptcy Court, District of Nevada, 828 F.2d 1385, 1389 n. 11 (9th Cir. 1987). (Br. in Opp.

p. 4) Respondent deliberately omits the major portion of the quoted footnote in an attempt to show that the cited case had nothing to do with any jurisdictional issues involved in an appeal from bankruptcy court orders.

Mullis, the appellant in the cited case, had contended that by continuing to act after Mullis had appealed, the bankruptcy court had acted "in the clear absence of all jurisdiction", thus removing judicial immunity and allowing Mullis to sue the judge for damages. However, because Mullis had not properly appealed the orders, the bankruptcy court was not divested of jurisdiction, and could thus continue to issue orders in the case. As the omitted portion of the footnote establishes, what the Ninth Circuit Court did not have to address in the case was the type of jurisdictional violation a bankruptcy judge commits in continuing to act after a proper notice of appeal has been filed. As the Court noted, the concept that a properly filed appeal acts

to divest the bankruptcy court of jurisdiction over a final order, was correctly cited by Mullis as having been established by the Ninth Circuit Court in In re Bialac, 15 B.R. 901, 903 (Bankr. 9th Cir. 1981), aff'd, 694 F. 2d 625 (9th Cir. 1982). Mullis, 828 F.2d at 1389. It is Respondent, not Petitioner, who has "misleadingly" cited Ninth Circuit case law to this Court.

Respondent then states: "Petitioner's reliance upon Midwest Properties No. Two v. Big Hill Invest. Co., Inc., 93 B.R. 357 (N.D. Tex. 1988) is also misplaced." (Br. in Opp. p. 4) Respondent argues that this case was actually supportive of the BAP decision, due to the fact that even if the ordered findings and conclusions were "a nullity" due to lack of jurisdiction, as in the Midwest case, the BAP decision was a correct one because the BAP "did not rely exclusively" upon them, and had also "reviewed the detailed record". (Br. in Opp. p. 5) Respondent implies that the

District Court affirmed the appealed orders in Midwest, 93 B.R. 357, stating that while the Court did not consider the improper Findings and Conclusions, it found "ample support for the sanctions order in the record."

The District Court in the Midwest case stated that the untimely findings and conclusions, filed more than ten days after the entry of the appealed order, could not be considered on appeal, since the bankruptcy court no longer had the jurisdiction to issue them. The District Court called them "merely gratuitous statements" of the issuing judge, citing In re Texas Extrusion Corp., 836 F.2d 217, 220-21 (5th Cir. 1988) and Gribble v. Harris, 625 F.2d 1173, 1174 (%th Cir. 1980). Midwest, 93 B.R. at 360. While it is factually correct that the District Court did find support in the record for the sanctions to be ordered, it did not affirm the orders; but vacated in part, and reversed and remanded. Midwest, 93 B.R. at 366.

In the instant case, both the BAP and the Ninth Circuit Court relied heavily on the untimely findings and conclusions. (Pet. App. A-2, A-19 thru' A-21) The BAP review of the record was for the purpose of finding support for the bankruptcy court's conversion order, so that the BAP could state: "The bankruptcy court's findings of fact are not clearly erroneous." (Pet. App. A-21)

Respondent would have this Court believe that the conversion order was correctly affirmed by the BAP by an independent review of the record without regard to the untimely findings and conclusions. This statement, as well as Respondent's accusations re the cited case law provided by Petitioner, are simply untrue, and a prime example of the type of pleadings filed on behalf of Respondent by its counsel in the proceedings below.

The BAP decision erroneously stated that Petitioner was arguing the bankruptcy court was divested of jurisdiction over the entire

bankruptcy case once the appeal was filed. Respondent also presents this erroneous concept of the jurisdictional issue, quoting the BAP decision as support. (Br. in Opp. p.3) As presented in the petition, and in every brief filed by Petitioner in the proceedings below, what Petitioner was arguing was that FRBP 8005 controlled what orders a bankruptcy judge can issue following an appeal, and the orders may not alter the status-quo of those parties involved in the appeal.

In summary, the only "findings" which could be considered by the BAP or the Ninth Circuit Court in reviewing the conversion order were the statements of Judge Russell which he made at the hearing on the conversion motion. As the transcript of that hearing clearly reveals, the reason that the case was being converted was because Petitioner had appealed Judge Russell's prior orders, and caused the case to go on "too long". (Pet. App. A-108, 109)

B. Respondent's Argument That Petition Is Moot

Respondent argues that the petition is now "moot" because the Bankruptcy Court has issued a Chapter 7 discharge in Petitioner's underlying bankruptcy case, and Petitioner has chosen to file suit against Respondent in State Court. Respondent argues, therefore, that this Court cannot grant any timely or effective relief. (Br. in Opp. p. 6)

In the proceedings before the BAP, an attempt to have the appeal dismissed as moot was also launched by Respondent, who filed totally false statements in its effort. (Pet. App. A-22 thru' A-24) In this attempt, half-truths are presented, and Respondent omits pertinent facts that negate its argument.

The discharge order was issued by the Clerk, and bore the wrong case numbers. The Notice was sent to the wrong address, which caused a delay in receiving it. Respondent makes no mention of the fact that Petitioner, upon receiving the Notice, immediately moved

to have the discharge order vacated. The discharge order was issued prior to the Ninth Circuit Court mandate being issued in the subject case of the petition herein, and the Petitioner argued that the Bankruptcy Court lacked the jurisdiction to issue the order.

Petitioner had earlier placed a motion before the Bankruptcy Court seeking to have its approval and assistance for a proposed plan whereby Respondent could be paid the non-disputed principal and interest amounts of its claims, while the disputed attorneys' fees, etc., would be placed into an interest-bearing account, pending the outcome of the Petitioner's various appeals. The reaction of Respondent was to utilize the improperly issued discharge order as grounds for an immediate foreclosure, which then forced the filing of Petitioner's State Court action.

The Petitioner also moved the Bankruptcy Court for an order staying any future case dismissal, or discharge order, and, after

receiving notice of the scheduled foreclosure sale, moved for an order which stayed any and all such actions, prior to the full resolution of the pending appeals. The Bankruptcy Court denied the motion to vacate the Clerk's issued discharge, and then denied the motion for approval of Petitioner's proposal for the payment to Respondent, and the motion for the stay re foreclosure, stating that the order of discharge had divested it of jurisdiction over the other two motions. The motion for a stay of any future dismissal or discharge, prior to the full resolution of the pending appeals, was not addressed.

The Petitioner timely moved for the reconsideration of the denials, pursuant to the provisions of FRBP 9023, and this matter, as well as the undecided stay motion, were both submitted for decision following hearing, and remain undecided at this time. In an abundance of caution, Petitioner also moved for a stay of the prior orders pending decision

of the reconsideration motion, as provided by FRBP 7062(b). Worrying that the denial of her motions might moot the petition, a stay application was submitted by Petitioner to Supreme Court Justice O'Connor, who denied it on September 22, 1992. Petitioner, however, now realizes that if the Bankruptcy Court did deny the pending motion for reconsideration, an appeal of that action will ensure that the "controversy" will remain viable.

As for Respondent's claim re Petitioner having chosen the State Court as the forum to "pursue whatever claims she may have" against Respondent (Br. in Opp. p. 6), this argument is absurd. Petitioner is pursuing a state law claim in a State Court; this action in no way removes all the "claims" against Respondent which have arisen under Bankruptcy Law, nor does it "moot" the issues presented to this Court by the Petition for Certiorari; despite the Respondent's arguments to the contrary, those issues remain very viable.

C. Improper Judicial Conduct Argument

Respondent asserts that there was no improper judicial conduct in the proceedings below, and that Petitioner has "simply misused the Court system to avoid her obligations to her creditors." (Br. in Opp. p. 7) This statement is proven to be untrue by the record in the underlying bankruptcy case. The filed Plan of Reorganization proposed payment in full of the allowed secured claims of Respondent, once the amounts were established by the resolution of the appeals that involved the claims. Petitioner planned to utilize the subject real property to pay the secured claims, once proper title was established and the property returned as an asset of the estate. This treatment of secured creditor claims was in full accord with this Court's directives set forth in United Savings Ass'n. v. Timbers of Inwood Forest, 484 U.S. 365 (1988). It did not suit Respondent's wishes, however, whose counsel threatened to

block confirmation of the filed plan unless Petitioner agreed to pay all attorney's fees that might be submitted.

Although the plan had originally been fully acceptable to Judge Russell when he had approved Petitioner's disclosure statement following a properly noticed hearing (Pet. pp. 11-12, Pet. App. A-35, 36), he later, after Petitioner had appealed his orders involving the subject property, ordered Petitioner to provide full payment to Respondent within a six-month period of time, and although the property value far exceeded Respondent's claims, both disputed and undisputed, Judge Russell ordered Petitioner to provide monthly payments to Respondent until its full claims were paid, including its attorney's fees. As the record reveals, Judge Russell had assured Petitioner that the issue of attorney's fees was not being considered, and that Petitioner would have an opportunity to examine the bills submitted in camera by Respondent's counsel,

before he made any ruling on the billed-for attorney's fees. (Pet. App. A-105 thru' 107) There had been no properly noticed hearings on the issue of entitlement under 11 U.S.C. § 506(b) prior to the awarding of those fees.

The order to pay Respondent's claims in full within a six-month period, if obeyed, would have forced Petitioner to take action that would have mooted most, if not all, of her pending appeals. In addition, despite the fact that the subject property was the major asset of the estate, and absolutely necessary to an effective reorganization, Judge Russell had ordered that Respondent could proceed with immediate foreclosure, with no further hearing, should Petitioner fail to make the ordered monthly payments. Despite the fact that Petitioner's plan had proposed full payment of Respondent's claims once they had been properly established, as stated by Judge Russell himself, "the purpose of ordering the [Petitioner] to satisfy First

Interstate within six months of confirmation was to impress upon her the importance of treating that creditor fairly in her plan." (Pet. App. A-57) C;early, Judge Russell was making sure that the over-secured creditor received more than fair treatment by dictating what Petitioner's plan had to provide for Respondent. No similar concern was shown by Judge Russell for the unsecured creditors, who were to later join with Petitioner in the opposition to the conversion motion. As has been held by this Court, however, the role of the bankruptcy court does not include formulating a plan of reorganization. Norwest Bank v. Ahlers, 485 U.S. 197 (1988).

Petitioner questioned the propriety of BAP Judge Barry Russell's actions in denying her motion for panel review of his prior single-judge order by another single-judge order. As the appeal actually consisted of three appeals, Petitioner had requested that the 30-page limitation for her opening brief

be expanded. BAP Judge Russell denied the motion in a single-judge order, and Petiti moved for panel review of the order, as is provided by FRBP 8011(e). The motion for panel review was untimely denied by Bap Ju Russell in a second single-judge order, wh forced Petitioner to drastically reduce he opening brief and hastily refile it, in or to comply with BAP Judge Russell's order. Petitioner's ability to fully present and argue the issues involved in the consolida three appeals was therefore severely impe

Petitioner contended that the foregoi actions of the Honorable David E. Russell the Honorable Barry Russell, Bankruptcy Cc Judges, constituted improper judicial cond in the proceedings below. Respondent does address these actions, which were detailed the petition specifically, but instead, st that there is no factual support in the re for Petitioner's claims of misconduct. (E in Opp. pp. 7, 8)

CONCLUSION

The importance and substantiality of the questions presented in the Petition for Certiorari No. 92-416 have not been refuted by Respondent's Brief in Opposition. In light of the inability of the Respondent to address the issues presented in the Petition without grossly distorting the facts, and for the reasons set forth in the Petition itself, it is respectfully submitted that the Petition should be granted.

DATED: October 9, 1992.

Respectfully submitted,

JoAnne M. Weston

Petitioner in pro per